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October 9, 2002

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: MIZE, et al.

Group Art Unit: 1772

Serial No.: 08/941,602

Examiner: Nolan, S.

Filing Date: September 30, 1997

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Title: "PATCH BAG AND PROCESS OF MAKING SAME"

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APPEAL BRIEF UNDER 37 C.F.R. 1.192

Commissioner of Patents
Washington, D.C. 20231

Sir:

This Appeal Brief under 37 C.F.R. 1.192 is submitted further to the Notice of Appeal mailed 6 May 2002 (received in the Mail Room on 20 May 2002), the two period for filing of the Appeal Brief being extended three months, i.e., through 20 October 2002, by the concurrently-filed request for a three-month extension of time. The undersigned authorizes the Commissioner to charge Deposit Account 07-1765 in the appropriate amount for the brief fee. Moreover, the Commissioner is authorized to charge Deposit Account 07-1765 should any further amount be deemed to be due. Appellants respectfully request reversal of the rejection, in view of the arguments presented below.

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REAL PARTY IN INTEREST

The real party in interest in this patent application is Cryovac, Inc., the assignee of a 100% interest in this application.

RELATED APPEALS AND INTERFERENCES

There is no other currently-pending appeal which is related to the instant appeal, i.e., there is no appeal pending of the claims of a related application, such as a continuation or divisional application.

THE STATUS OF THE CLAIMS

The claims on appeal are Claims 1-7, 18, and 22-30. Claims 20 and 31-35 stand allowed. Claims 8-17, 19, and 21 have been withdrawn from consideration under 37 CFR 1.142(b) as not being drawn to the elected invention. A copy of the claims presently on appeal appears in Appendix A, Pages 22-26.

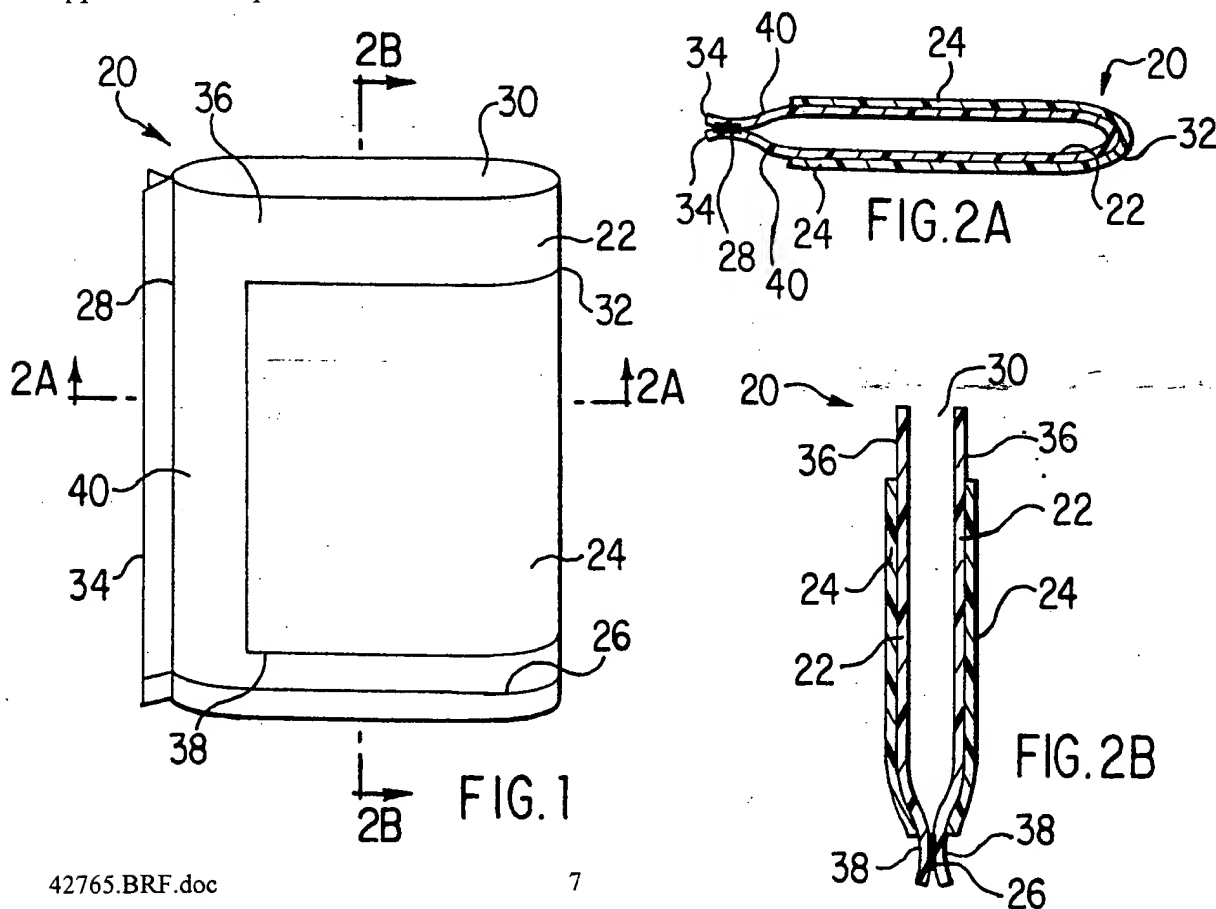
STATUS OF AMENDMENTS

All amendments which have been filed have been entered. No amendments have been filed after the office action of 5 November 2001.

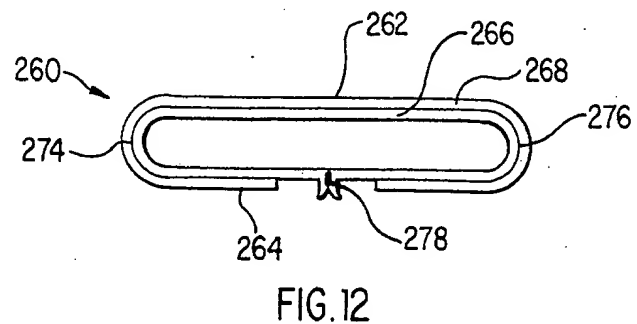
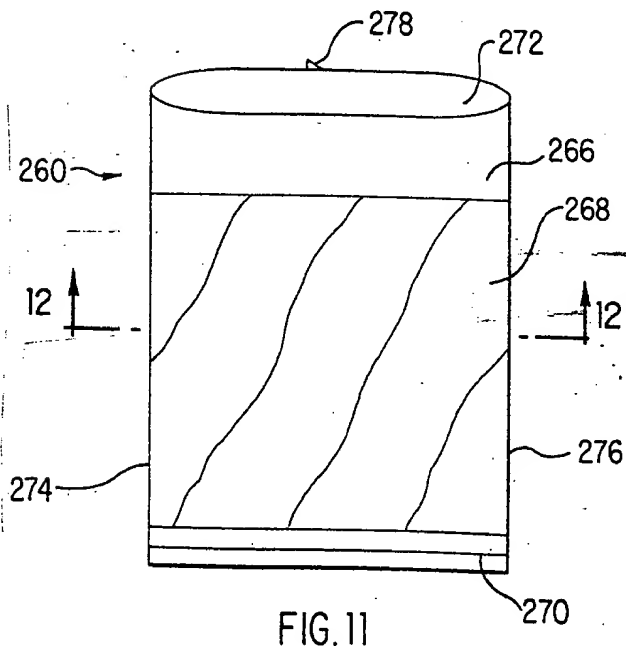
SUMMARY OF THE INVENTION

Appellants invention is directed to patch bags, i.e., bags having a patch adhered thereto. These patch bags are designed especially for the purpose of packaging bone-in meat products. [Page 1 lines 19-23.]

Appellants' Independent Claim 1 is directed to a patch bag in which the bag has an open top, a bottom seal, a side-seal at a first side edge, and a seamless second side edge. [Page 2 lines 15-20.] While the patch does not extend to either the bottom seal or the side seal (i.e., neither seal is through the patch), the patch does cover a portion of the seamless second side edge, and more than 50 percent across the width of each of the lay-flat sides of the bag. [Page 2 lines 8-14, FIGs. 1, 2A, and 2B.] Appellants' FIG.s 1, 2A, and 2B illustrate the patch bag of Appellants' independent Claim 1, as follows:



Appellants' Independent Claim 18 is directed to a patch bag in which the bag has an open top, a bottom seal, a first lay-flat side, a second lay-flat side, a seamless first side edge, and a seamless second side edge, and a backseamed seal running the length of the bag. [Page 5 lines 21-25.] While the patch does not extend to the backseamed seal or the bottom seal (i.e., neither seal is through the patch), the patch covers across an entirety of a width of the first lay-flat side of the bag, as well as covering a portion of the first and second seamless side edges. Moreover, the patch covers more than 50 percent across the width of the second lay-flat side of the bag. [Page 2 lines 8-10; FIG.s 11 and 12.] Appellants' FIG.s 11 and 12 illustrate a patch bag in accordance with Appellants' independent Claim 18:



ISSUES

The issues on appeal are as follows:

(I) WHETHER CLAIMS 1-7, AND 22-25 ARE PATENTABLE OVER
BRADY ET AL IN VIEW OF WILLIAMS ET AL

(II) WHETHER CLAIMS 18 AND 26-30 ARE PATENTABLE OVER
RANDALL IN VIEW OF BRADY ET AL

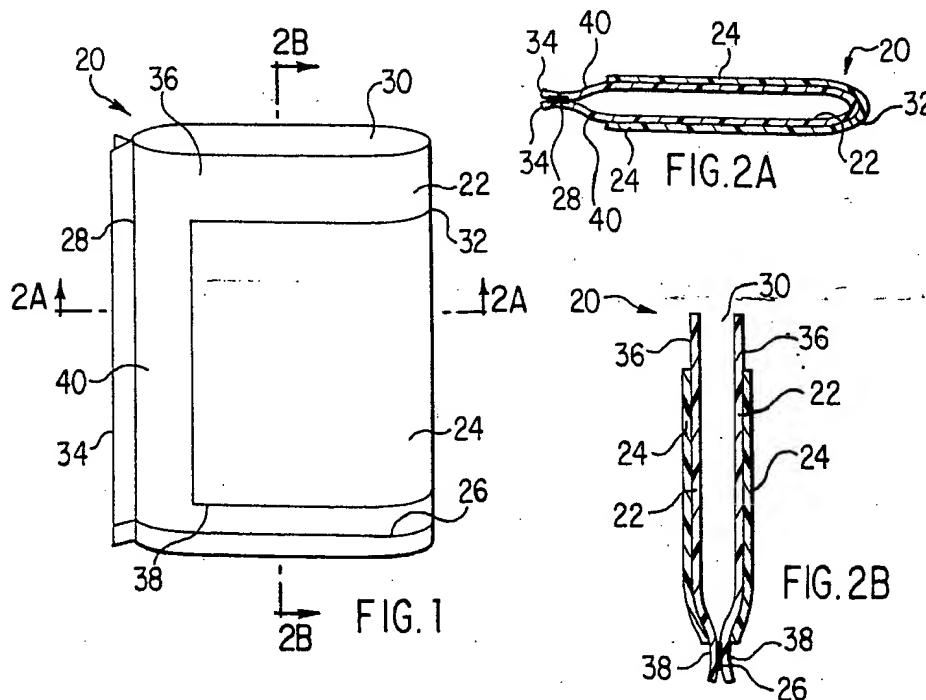
THE GROUPING OF THE CLAIMS

For the purpose of this appeal only, Claims 1-7 and 22-25 stand or fall together. In addition, Claims 18 and 26-30 stand or fall together. No arguments specific to one or more dependent claims, but inapplicable to the corresponding independent claim, are being asserted at this time. However, Appellants reserve the right to later assert such further and more specific arguments if a continuation application is filed, in litigation of a patent issuing from the instant application, etc.

THE ARGUMENTS

I. CLAIMS 1-7 AND 22-25 ARE PATENTABLE OVER BRADY ET AL IN VIEW OF WILLIAMS ET AL

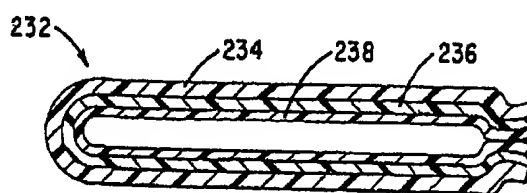
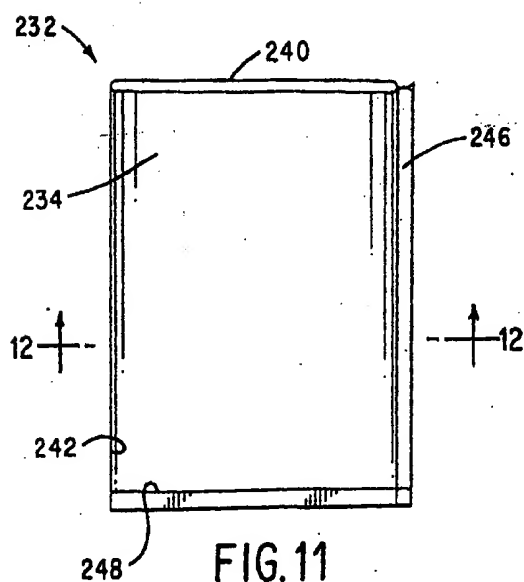
Claim 1 is directed to a patch bag in which the bag has an open top, a bottom seal, a side-seal at a first side edge, and a seamless second side edge. The patch covers a portion of the seamless second side edge of the bag, as well as at least a portion of both the first lay-flat side of the bag and the second lay-flat side of the bag. The patch covers (i.e., extends) more than 50 percent across the width of *each* of the lay-flat sides of the bag. The patch does not extend to either the bottom seal or the side seal. Figure 1, Figure 2A, and Figure 2B, reproduced below, illustrate the patch bag of Claim 1:



It is important to note from FIG 2A that patch 24 is not only covering a portion of seamless bag side edge 32, but also that patch 24, by itself, covers more than half way across the width of each lay-flat side of bag 22. More particularly,

viewing FIG 1 and FIG 2A together, it is readily apparent that patch 24 extends more than half way across the “upper” lay-flat side of bag 22, as well as more than half way across the “lower” lay flat side of bag 22. It is also important to note that patch 24 does not extend as far as either bottom seal 26 or side seal 28. All of these features are recited in Appellants’ Claim 1.

The Examiner rejects Appellants’ Claim 1 (as well a dependent Claims 2-7 and 22-25) as obvious over WO 96/00688, to Brady et al (“BRADY et al”) in view of U.S. Patent No. 5,540,646, to Williams et al (“WILLIAMS et al”). The Examiner directs attention to Figure 11 of BRADY et al. Appellant’s note that FIG. 11 and FIG. 12 of BRADY et al are both directed to the same embodiment, as follows:



It should be noted that the patch bag of FIG. 11 of BRADY et al has an open top 240, a bottom seal 248, a first side edge 242 which is seamless, and a second side edge having side seal 246. However, the “patch” on the bag of FIG. 11 is not a “patch” in the conventional sense that a true “patch” covers *less* than all of the bag. Rather, the “patch” in the article of FIG. 11 of BRADY et al is simply another layer or layers laminated to the bag film, and is cut to exactly the same size as the bag film. As a result, the bottom seal 248 and the side seal 246 are through the “patch” portion of the laminate as well as through the “bag” portion of the laminate. This is clearly illustrated in viewing the BRADY et al combination of FIG. 11 and FIG. 12, above.

In the embodiment of FIG. 11 and FIG. 12 of BRADY et al, the “patch” covers all the way to both side edges, as well as all the way to the bottom edge of the bag. Note Page 3 lines 4-8 of BRADY et al, as follows:

The present invention provides a patch bag in which patches are adhered to both the bag as well as to one another, to provide puncture-resistance *throughout a region extending around substantially the entirety of the patch bag*. [Emphasis Added]

Indeed, the patch bag of FIG. 1 of BRADY et al is an end-seal patch bag in which two patches are adhered to the bag, with each patch overhanging both side edges of the bag, with the overhanging patch portions being adhered to one another.

Thereafter, the Examiner relies upon WILLIAMS et al to reduce the size of the “patch” of FIG. 11 and FIG. 12 of BRADY et al, in order to modify the patch bag of BRADY et al to result in Appellants’ patch bag. WILLIAMS et al is most easily understood by viewing FIG. 8 and FIG. 9 thereof, as follows:

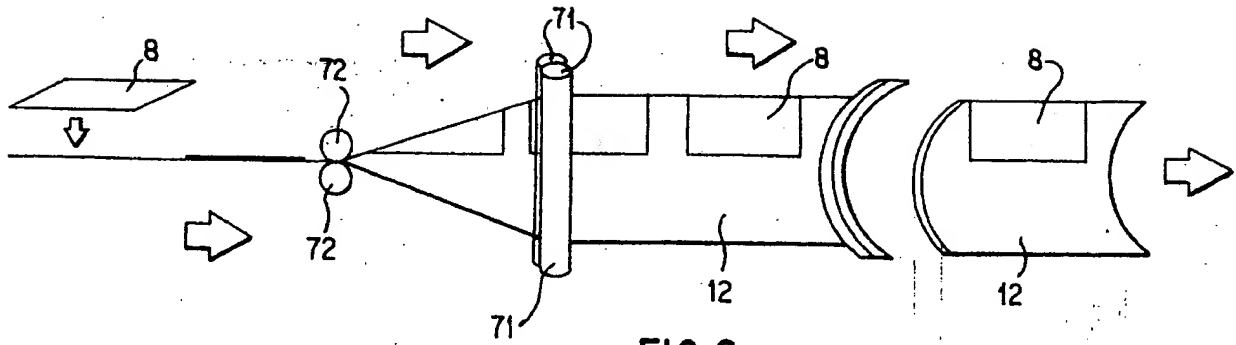


FIG. 8

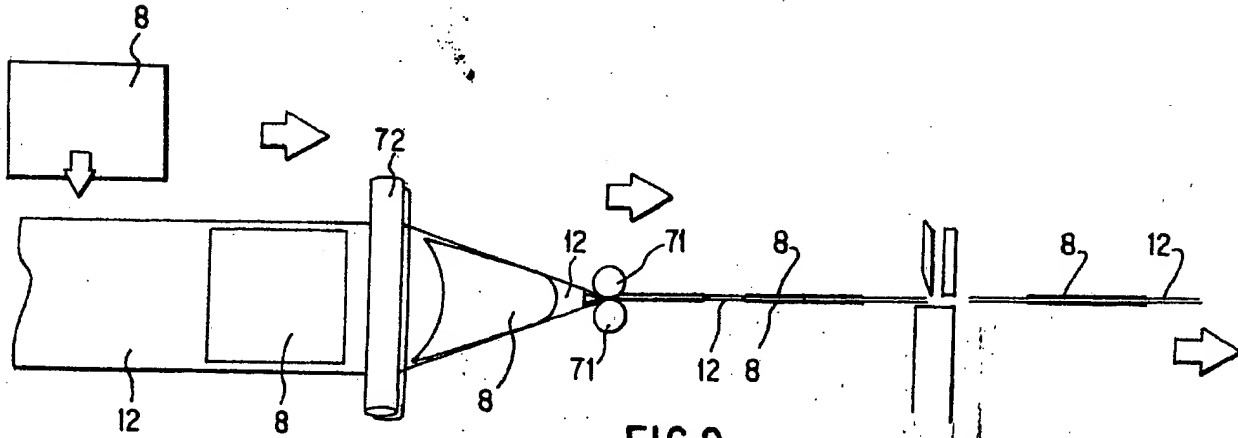


FIG. 9

As can be seen from viewing FIG. 8 and FIG. 9 of WILLIAMS et al, the patch bag of WILLIAMS et al does NOT have a patch which covers more than 50 percent across the width of each of the lay-flat sides of the bag resulting patch bag. Rather, since the patch has a width which is *less than* the width of the lay-flat bag tubing, as is clearly seen in FIG. 9, this patch cannot possibly extend more than 50 percent across each of the lay-flat sides of the bag.

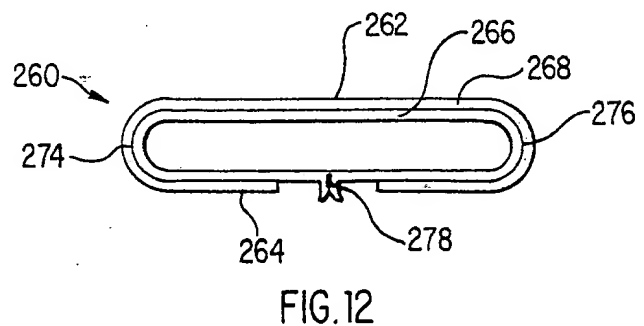
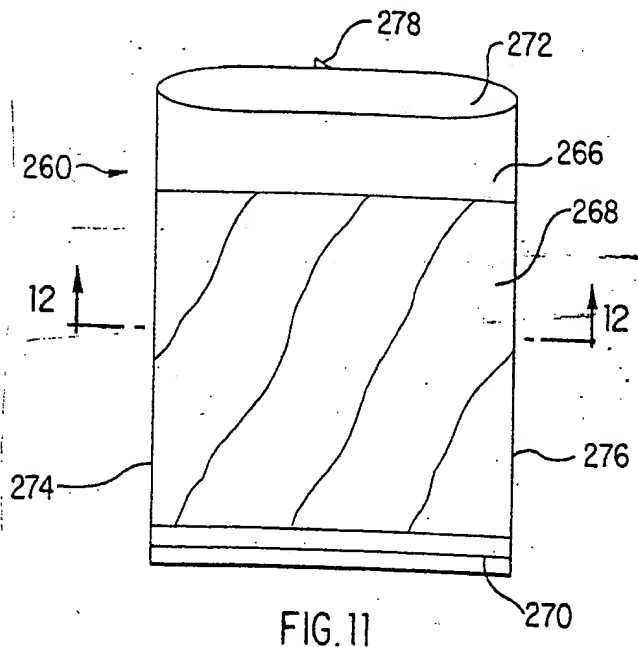
In modifying BRADY et al with WILLIAMS et al to arrive at Appellants' claimed patch bag, one must reduce the extent to which the patch of BRADY et al extends across the lay-flat sides of the bag. In doing this, the patch is being altered in a manner so that it no longer serves the express objective of BRADY et al, i.e., to "...provide puncture-resistance *throughout a region extending around substantially the entirety of the patch bag*", which of course is a feature of the patch bag of FIG 11 and 12 of BRADY. In other words, in order to arrive at Appellants' patch bag, the Examiner decreases the size of the patch of BRADY et al so that it no longer covers either the side seal or the bottom seal, and so that it no longer extends around substantially the entirety of the patch bag. Of course, such a modified patch bag is no longer in accordance with the teachings of BRADY et al.

Thus, the Examiner uses WILLIAMS et al to modify BRADY et al in a manner which is inconsistent with the teaching of BRADY et al. This is not a valid manner of combining reference documents. It is not permissible to use WILLIAMS et al to modify BRADY et al in a manner which defeats a stated objective of BRADY et al. As a result,

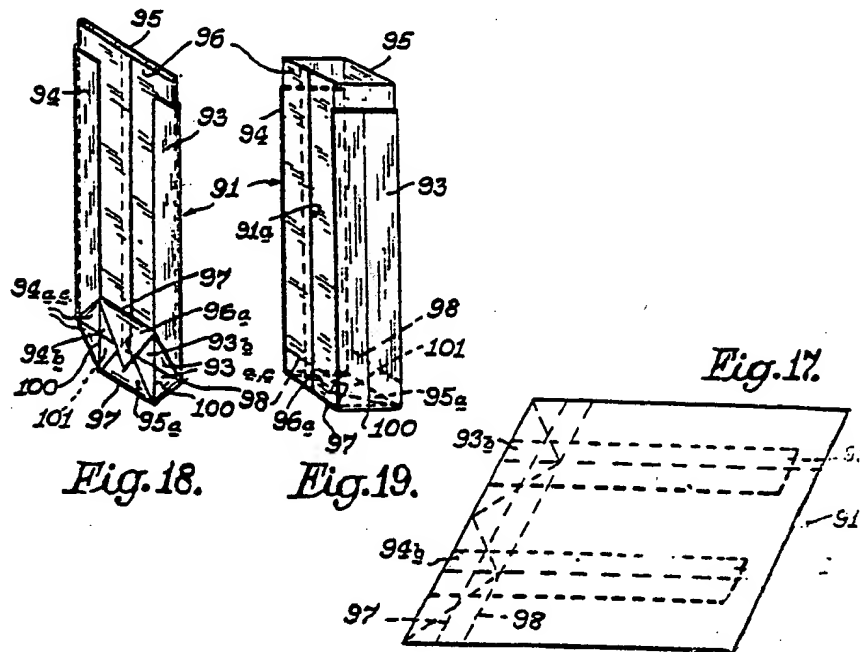
no prima facie case of obviousness has been made out. Claims 1-7 and 22-25 are patentable over BRADY et al in view of WILLIAMS et al.

**II. CLAIMS 18 AND 26-30 ARE PATENTABLE
OVER RANDALL IN VIEW OF BRADY ET AL**

Independent claim 18 is directed to a patch bag comprising a bag and a patch. The bag is a lay-flat bag. The bag has an open top, a bottom seal, seamless side edges, and a backseamed seal on the second lay-flat side, the backseamed seal running the length of the bag. The patch covers: (i) across an entirety of a width of the first lay-flat side of the bag; (ii) a portion of the seamless first side edge; and (iii) a portion of the seamless second side edge. The backseamed seal is through the first film but not through the second film, and the patch does not extend to the backseamed seal. Appellants' FIG. 10A, FIG. 10B, FIG. 10C, FIG. 10G, and FIG. 10H illustrate a process for making this patch bag, with the resulting patch bag being illustrated in Appellants' FIG. 11 and FIG. 12, as follows:



In stark contrast to the lay-flat patch bag of Appellants' FIG 11 and FIG 12, the Examiner relies upon the bag of FIG 17, FIG 18, and FIG 19 of RANDALL (i.e., British specification 654,460), as follows:



The Examiner relies upon a teaching in RANDALL that the bag of Figs. 17, 18, and 19 has reinforcing pieces 93 and 94 which are equal to the width of the side wall of the opened bag, with the reinforcing pieces being applied externally to the bag. See RANDALL at Page 8 lines 91-100. The Examiner states that Fig. 18 of RANDALL shows that the reinforcing piece is wrapped around a portion of the seamless edges of the bag, without touching the sealed bottom of the bag.

In response, Appellants contend that Claim 18, as well as dependent Claims 26-30, are patentable over RANDALL in view of BRADY et al. Appellants note that no single reinforcing piece of the bag of Figs. 17, 18, and 19 of RANDALL covers:

- (i) across an entirety of a width of the first lay-flat side of the bag,
while *also* covering
- (ii) a portion of the seamless first side *edge*,
while *also* covering
- (iii) a portion of the seamless second side *edge*,
while *also* covering
- (iv) more than 50 percent across the width of each of the lay-flat sides of the bag,
while also
- (v) not extending to the backseamed seal,

all of these features being recited in Appellants' Claim 18.

While the reinforcing pieces in RANDALL could be considered to cover portions of "side edges" of the bag of RANDALL (i.e., (ii) and (iii) above), and could be considered to not extend to the backseamed seal (i.e., (v)), clearly there is no single reinforcing piece in RANDALL which meets (i) above, not to mention (i) above in combination with (iv) above.

The bag of Figs. 17, 18, and 19 of RANDALL is not a *lay-flat* bag. Rather, the bag of Figs. 17, 18, and 19 of RANDALL is a *flat-bottomed* bag. While a lay-flat bag has a *bottom edge* (which in the case of Appellants' Claim 18 has a bottom seal, as illustrated in Appellants' FIG. 11), the bag of Figs. 17, 18, and 19 of RANDALL has a flat bottom formed by a plurality of regions of the sheet material which are folded onto one another and adhered to one another to form the strong, flat bottom disclosed by RANDALL. Those of skill in the art know that a lay-flat bag is different from a flat-bottomed bag. The lay-flat bag of Appellants' Claim 18 is formed from a flat film sealed to itself to form a "backseamed" tubing having a lengthwise seam, i.e., as in the bag of Appellants' FIG.s 11 and 12, with the bag bottom being formed by a transverse seal across the tubing. Those of skill in the art know that this bag bottom is not a "flat" bottom.

Although the bag of Figs. 17, 18, and 19 of RANDALL does have a longitudinal “backseam” 91a, neither of reinforcing pieces 93 and 94 of RANDALL extends across the *entire width of the bag*, as illustrated in the bag of Appellants’ FIG.s 11 and 12 and as recited in Appellants’ Claim 18. Still further, there is no single reinforcing piece 93 or 94 in RANDALL which extends across the *entire* width of the bag PLUS covers two seamless side edges of the bag, PLUS covering more than 50% across the width of each of the lay-flat sides of the bag, as recited in Appellants’ Claim 18.

In order to arrive at Appellants’ claimed patch bag as recited in Claim 18, one would have to substitute a lay-flat bag for the gusseted bag of RANDALL, and one would also have to provide a patch which not only covers across one entire lay-flat side of the bag, but also covers a portion of each of the seamless side edges of the bag, and which also covers more than 50 percent across the width of each of the lay-flat sides of the bag. RANDALL provides no teaching or suggestion to substitute a lay-flat bag for the flat-bottom bag. In fact, Column 1 lines 17 through Column 2 line 51 of RANDALL appears to describe bags which are in fact lay-flat bags, and discloses the bag of the invention of RANDALL as being superior to lay-flat bags, at least relative to maintaining bag shape, protecting contents inside the bag, and lowering the tendency of the bag to rupture. Thus, Appellants contend that RANDALL teaches away from a lay-flat bag which lacks a flat bottom. Notably, all of the bag figures in RANDALL illustrate bags having flat bottoms. Most also have side gussets. None of these bags is a lay-flat bag.

Moreover, RANDALL does not appear to contain any teaching or suggestion to provide a patch which by itself covers across an entire lay-flat side of the bag plus two seamless side edges of the bag, as well as covering more than 50 percent across the width of each of the lay-flat sides of the bag. While BRADY et al, discussed above, teaches a patch which covers across the entirety of both lay-flat sides of the bag, the patch of FIG. 11 and FIG. 12 of BRADY et al is actually a layer of a laminate from which the entire bag is formed. Thus, the "patch" in FIG. 11 and FIG. 12 of BRADY et al extends all the way around the bag, and as pointed out above, this is a principal objective of BRADY et al. It must also be noted that Appellants' Claim 18 recites the patch as not extending as far as the backseamed seal, with the backseamed seal being through the bag film but not through the patch film. To use the patch of FIG. 11 and FIG. 12 of BRADY et al to enlarge one of the patches on the flat-bottomed bag of RANDALL so that it covers all of one lay-flat side of the bag plus two seamless side edges and so that it extends more across more than 50 percent of each side of the bag and so that it does not extend to the backseamed seal, would be to use BRADY et al in a manner inconsistent with the stated objective of BRADY et al to provide patch coverage "...throughout a region extending around substantially the entirety of the patch bag." [BRADY et al, Page 3 lines 4-8, also quoted above.] As a result, Appellants contend that BRADY et al contains no teaching or suggestion to modify one of the patches in the bag of RANDALL so that it covers more than 50 percent across the width of each of the sides of the bag of RANDALL, but so that it does NOT extend to the backseamed seal.

Appellants contend that the Examiner has not set forth a prima facie case of obviousness of any one or more of Appellants' Claims 18 and 26-30 as obvious over RANDALL in view of BRADY et al. There is no prima facie case because neither RANDALL nor BRADY et al, considered alone or in combination, teaches or suggests a patch which by itself covers across an entire lay-flat side of the bag, plus covers at least a portion of two seamless side edges of the bag, plus covers more than 50 percent across the width of each of the lay-flat sides of the bag, but does not extend to the backseamed seal, as recited in Appellants' independent Claim 18.

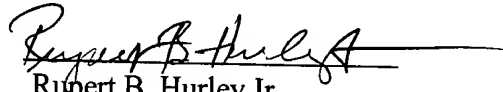
VI. CONCLUSION

Based on all the arguments set forth above, Appellants respectfully request that the Board of Appeals reverse the rejection of Claims 1-7 and 22-25 as unpatentable over BRADY et al in view of WILLIAMS et al, and reverse the rejection of Claims 18 and 26-30 as obvious over RANDALL in view of BRADY et al.

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October 9, 2002
DATE

Respectfully submitted,


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Appendix

1. A patch bag comprising a bag and a patch, wherein:

(A) the bag has an open top, a bottom seal, and a side-seal at a first side edge of the bag; and

(B) the patch covers a portion of a seamless second side edge of the bag and at least a portion of both a first lay-flat side of the bag and a second lay-flat side of the bag;

wherein the bag comprises a first film and the patch comprises a second film, and the side-seal is through the first film but not through the second film and the patch does not extend to either the bottom seal or the side seal, and the patch covers more than 50 percent across the width of each of the lay-flat sides of the bag.

2. The patch bag according to Claim 1, wherein the first film is a heat-shrinkable film and the second film is a heat-shrinkable film.

3. The patch bag according to Claim 1, wherein the first film is a first biaxially-oriented, heat-shrinkable film comprising an outside abuse layer, a core O₂-barrier layer, and an inside-sealant layer, and the second film is a second biaxially-oriented, heat-shrinkable film.

5. The patch bag according to Claim 1, wherein the end-seal is through the first film but not through the second film.

7. The patch bag according to Claim 1, wherein the patch has a width of from about 20 to 190 percent, based on the width of the bag.

18. A patch bag, comprising:

(A) a lay-flat bag having an open top, a bottom seal, a first lay-flat side, a second lay-flat side, a seamless first side edge, and a seamless second side edge;

(B) a patch covering:

(i) across an entirety of a width of the first lay-flat side of the bag;

(ii) a portion of the seamless first side edge; and

(iii) a portion of the seamless second side edge; and

(C) a backseamed seal in the second lay-flat side of the bag, the backseamed seal running the length of the bag, wherein the bag comprises a first film and the patch comprises a second film, and the backseamed seal is through the first film but not through the second film and the patch does not extend to the backseamed seal;

wherein the patch does not cover the bottom of the bag, the patch does not extend to the bottom seal, and the bottom seal is through the bag and not through the patch, and the patch covers more than 50 percent across the width of each of the lay-flat sides of the bag.

20. A patch bag, comprising:

- (A) a bag having an open top, a first side-seal, a second side-seal, and a seamless bottom edge; and
- (B) a single patch which covers a portion of the seamless bottom edge of the bag, at least a portion of an outside surface of a first lay-flat side of the bag, and at least a portion of an outside surface of a second lay-flat side of the bag, the single patch having a length of from about 101 to 200 percent of a length of the bag, wherein the bag comprises a first film and the patch comprises a second film, and the first and second side seals are through the first film but not through the second film and the patch does not extend to either the first side seal or the second side seal.

22. The patch bag according to Claim 1, wherein the patch is adhered to an outside surface of the bag.

23. The patch bag according to Claim 1, wherein the first film has a thickness of from about 1.5 to 5 mils, and the second film has a thickness of from about 2 to 8 mils.

24. The patch bag according to Claim 23, wherein the second film has a thickness of from about 3 to 6 mils.

25. The patch bag according to Claim 1, wherein the bag has only one patch adhered thereto.

26. The patch bag according to Claim 18, wherein the bag comprises a first biaxially-oriented, heat-shrinkable film comprising an outside abuse layer, a core O₂-barrier layer, and an inside-sealant layer, and the patch comprises a second biaxially-oriented, heat-shrinkable film.

27. The patch bag according to Claim 26, wherein:

the outside abuse layer comprises at least one member selected from the group consisting of ethylene/alpha-olefin copolymer having a density of from about 0.85 to 0.95 g/cc, propylene/ethylene copolymer, polyamide, ethylene/vinyl acetate copolymer, ethylene/methyl acrylate copolymer, and ethylene/butyl acrylate copolymer;

the core O₂-barrier layer of the first film comprises at least one member selected from the group consisting of ethylene/vinyl alcohol copolymer, polyvinyl chloride, polyvinylidene chloride, polyamide, polyester, and polyacrylonitrile;

the inside-sealant layer of the first film comprises at least one member selected from the group consisting of thermoplastic polyolefin, thermoplastic polyamide, thermoplastic polyester, and thermoplastic polyvinyl chloride; and

the second biaxially-oriented, heat-shrinkable film comprises at least one member selected from the group consisting of ethylene/alpha-olefin copolymer having a density of from about 0.85 to 0.95 g/cc, propylene/ethylene copolymer,

polyamide, ethylene/vinyl acetate copolymer, ethylene/methyl acrylate copolymer, and ethylene/butyl acrylate copolymer.

28. The patch bag according to Claim 18, wherein the bag comprises a first film and the patch comprises a second film, and wherein the backseamed seal is through the first film but not through the second film.

29. The patch bag according to Claim 18, wherein the first film is a heat-shrinkable film and the second film is a heat-shrinkable film.

30. The patch bag according to Claim 18, wherein the patch has a width of from about 20 to 190 percent, based on the width of the bag.